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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE RICHARDS,

Defendant and Appellant.

B286658

(Los Angeles County
Super. Ct. No. MA057400)

APPEAL from orders of the Superior Court of Los Angeles County, Lisa M. Strassner, Commissioner. Reversed and remanded.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Clyde Richards appeals from postjudgment orders denying his motion to vacate a 2013 conviction for the sale or transportation of marijuana. Richards filed the motion under Penal Code section 1473.7¹ on the basis of newly discovered evidence. Richards contends on appeal the trial court erred in holding the hearing without him present and by failing to appoint an attorney to represent him. The People concede it was error to deny Richards a hearing, and we agree. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Conviction and Sentencing

The amended information charged Richards with 16 counts, including count 16 for the sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). After a jury trial, on August 13, 2013 Richards was convicted of the sale or transportation of marijuana, and was acquitted of the remaining charges. He was later sentenced to the middle term of three years in county jail.

B. Richards's Motion To Vacate His Conviction

On September 20, 2017 Richards filed a motion to vacate his conviction pursuant to section 1473.7 on the basis that “[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.” In support of his motion, Richards submitted his declaration in which he stated that at the time of his arrest on September 12, 2012, he was carrying in his wallet a

¹ Undesignated statutory references are to the Penal Code.

valid medical marijuana identification card stating his doctor had recommended marijuana for treatment of his medical condition. Despite Richards's effort to obtain the card in discovery, the People represented the card was not in their files. The card was discovered after his trial when Marjorie Gordon, the aunt of Richards's codefendant, retrieved Richards's personal belongings at the county jail. Richards submitted with his motion a copy of the medical marijuana card, with an expiration date of January 31, 2013. At the time of his motion, Richards had completed his sentence and was no longer in custody.

On September 20, 2017 the trial court denied the motion, concluding it was "not within the purview of [section] 1016.5," and Richards "is asking the court to act as [an] appellate court to reverse [the] jury conviction and it is not the job of the court." Neither Richards nor an attorney representing him was present at the hearing.

On October 2, 2017 Richards filed an amendment to his motion and a motion for reconsideration, clarifying that the motion was made only pursuant to section 1473.7, not section 1016.5.² On October 5, 2017 the trial court denied Richards's amended motion to vacate his conviction and for reconsideration. Richards was not present in court, nor represented by counsel. The same day the trial court sent a letter to Richards explaining its reasoning, stating, "[T]he court does not find the existence of newly discovered evidence as that alleged evidence was known to all parties and the court during the pendency of this action. No evidence has been provided to the court showing that any

² Richards's motion to vacate stated it was filed pursuant to section 1473.7, but the motion was on a Judicial Council form that listed both sections 1473.7 and 1016.5.

marijuana card existed AT THE TIME of the trial.” The court also found the motion “was not filed without undue delay from the time [Richards] discovered the evidence” because Richards indicated he was aware of the evidence at least since 2012.

Richards timely appealed.

DISCUSSION

Richards contends the trial court erred in denying him a hearing and failing to appoint an attorney to represent him. The People concede the trial court erred in failing to hold a hearing, and we agree.³ We review de novo the trial court’s denial of Richards’s motion to vacate his conviction. (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116 [“We independently review the order denying the motion to vacate which ‘presents a mixed question of fact and law.’”]; *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 [reviewing de novo trial court’s denial of section 1473.7 motion where defendant claimed violation of his constitutional right to effective assistance of counsel based on his attorney’s incorrect immigration advice].)

Former section 1473.7, subdivision (a), provided, “A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence” for one of two reasons, including that “[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law

³ The People do not address in their brief whether Richards had a right to appointed counsel. Instead, they state “[t]he hearing may be conducted without [Richards’s] personal presence only if [Richards] so requests, counsel is present and the court finds good cause.”

or in the interests of justice.” (§ 1473.7, subd. (a)(2).)⁴ A motion to vacate based on newly discovered evidence “shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section.” (§ 1473.7, subd. (c).)

Former section 1473.7, subdivision (d), provided, “All motions shall be entitled to a hearing. At the request of the moving party, the court may hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present.”⁵ The moving party has the burden of establishing by a preponderance of the evidence the grounds for relief. (§ 1473.7, subd. (e)(1).)

The trial court denied Richards’s first motion to vacate on September 20, 2017 and his amended motion to vacate on October 5, 2017, without Richards or an attorney on his behalf being present. As the People concede, because there is no record

⁴ The other basis for a challenge to a conviction or sentence is that “[t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a)(1).)

⁵ Section 1473.7 was amended, effective January 1, 2019, to provide in subdivision (d) that “[u]pon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.”

that Richards requested the hearing be conducted in his absence, nor was there a finding of good cause, the order denying the motion must be reversed. (Former § 1473.7, subd. (d).) On remand the trial court must hold a hearing with Richards present, unless Richards requests the hearing be held without him, Richards is represented by counsel at the hearing, and the trial court finds good cause to proceed in his absence. (Former § 1473.7, subd. (d).) On remand Richards may request the trial court appoint counsel to represent him at the hearing.⁶

We agree with Richards that because he was denied a hearing on his motion to vacate the conviction, the merits of his motion are not properly before us.

DISPOSITION

The orders denying Richards's motion and amended motion to vacate his conviction are reversed. On remand the trial court

⁶ We are not aware of any published authority addressing whether a party filing a motion for relief under former or current section 1473.7, subdivision (d), has a right to an attorney, although we note the language in the former section stated that a hearing may proceed without the moving party present only "if counsel for the moving party is present." In addition, "if a postconviction petition by an incarcerated defendant 'attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.'" (*People v. Rouse* (2016) 245 Cal.App.4th 292, 300, quoting *In re Clark* (1993) 5 Cal.4th 750, 780.) The trial court should determine in the first instance whether Richards has a right to appointed counsel to represent him on the motion.

must hold a hearing on his motion to vacate his conviction, as amended.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.